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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

_____ TERM, 1974

NO. 74-711

ROGER DUNLAP and PAUL CUNNINGHAM,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK R. BAILEY
DICKERSON, BAILEY AND VELA
5100 Westheimer, Suite 100
Houston, Texas 77027
(713) 627-0252

Counsel for the Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, ROGER DUNLAP and PAUL CUNNINGHAM, respectfully pray that a WRIT OF CERTIORARI issue to review the final opinion and judgment entered in this cause on November 5, 1974, by the UNITED STATES COURT of APPEALS for the SIXTH CIRCUIT, which affirmed the Petitioners' conviction for having, as officers of Tippens Furniture and Appliance, Inc., bankrupt, in contemplation of the filing of bankruptcy proceedings against the bankrupt, knowingly and fraud-

ulently and with intent to defeat the Bankruptcy Law transferred or concealed property of the bankrupt in violation of Title 18, United States Code, Section 152, and of having willfully, knowingly combined, conspired, confederated, and agreed together with each other to with unlawful and fraudulent intent, as officers of Tippens Furniture and Appliance, Inc., bankrupt, and in contemplation of the filing of bankruptcy proceedings against the bankrupt, and with intent to defeat the Bankruptcy Law, transfer or conceal property of the bankrupt in violation of Title 18, United States Code, Section 371.

OPINION BELOW

The Court of Appeals issued no opinion in their Order affirming the conviction of the Petitioners. A copy of the Order is attached hereto as Appendix A.

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit affirming the conviction of the Petitioners herein was filed on November 5, 1974. This Petition for the Writ of Certiorari was filed within thirty (30) days of that date. The Court's jurisdiction was invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the indictment under which the Petitioners were convicted, charging violation of Title 18, United States Code, Section 152, alleges facts with sufficient particularity to satisfy the Constitutional requisites of informing the Petitioners of the offense charged with sufficient clarity to enable the Petitioners to prepare a defense and

protecting the Petitioners against a subsequent prosecution for the same offense.

II. Whether the indictment under which the Petitioners were convicted, charging violation of Title 18, United States Code, Section 371, alleges facts with sufficient particularity to satisfy the Constitutional requisites of informing the Petitioners of the offense charged with sufficient clarity to enable the Petitioners to prepare a defense and protecting the Petitioners against a subsequent prosecution for the same offense.

III. Whether circumstantial evidence, comprised of proof of acts non-criminal in nature, should be viewed in the light most favorable to the Government when a conviction for transfering or concealing assets in contemplation of bankruptcy is challenged on the grounds of insufficient evidence.

IV. Whether circumstantial evidence, comprised of proof of acts non-criminal in nature, should be viewed in the light most favorable to the Government when a conviction for conspiracy to transfer or conceal assets in contemplation of bankruptcy is challenged on the grounds of insufficient evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioners' Federal constitutional claims are grounded on the Fifth and Sixth Amendment right to be tried upon an indictment that is legally sufficient in the facts alleged. The indictment herein challenged alleges violations of Title 18, United States Code, Section 152 and Title 18, United States Code, Section 371.

STATEMENT OF THE CASE

On October 24, 1973, a Federal Grand Jury sitting in the Eastern District of Tennessee returned a six count indictment charging the Petitioners, Paul Cunningham and Roger Dunlap, with alleged violations of Title 18, United States Code, Section 152 and of Title 18, United States Code, Section 371. The first five counts of the indictment alleged that the Petitioners were guilty of having transferred or concealed property of a bankrupt company, in contemplation of the filing of bankruptcy proceedings against that company. (18 U.S.C. 152) The sixth count of the indictment alleges that the Petitioners were guilty of having conspired to transfer or conceal the bankrupt company's property in contemplation of its involuntary bankruptcy. (18 U.S.C. 371).

Thereafter, on October 31, 1973, counsel for the Petitioners filed a timely motion to dismiss the indictment alleging, among other things, that counts one through six of the subject indictment are wholly insufficient in that they fail to state an offense pursuant to the Statutes of the United States of America, and that counts one through six are wholly and fundamentally insufficient in that they fail to comport with the proper rules of pleading pursuant to indictments. The motion was denied by Order of the District Court filed November 15, 1973.

On December 12, 1973, the Petitioners were tried before a jury in the United States District Court for the Eastern District of Tennessee, the Honorable Frank W. Wilson presiding. The Petitioners were each found guilty on all counts of the indictment.

At the close of the trial in the District Court, on December 14, 1973, the counsel for the Petitioners entered

a Motion for a Judgment of Acquittal and re-entered the Petitioners' Motion for a Directed Verdict. The Court overruled the Motion for a Directed Verdict. On December 20, 1973, counsel for the Petitioners filed a Combined Motion for Judgment of Acquittal and Dismissal of the Indictment with Memorandum of Law. The Honorable Judge Wilson ruled that said Combined Motion was without merit and overruled same with regard to each matter asserted therein by Order of the Court filed on January 22, 1974.

Petitioners filed a timely notice of appeal to the Sixth Circuit Court of Appeals on January 25, 1974. This notice was subsequently amended and refiled on February 1, 1974. A transcript of the trial proceedings (6 volumes) was filed on March 27, 1974.

Following argument to the Court, both by written brief and orally, the United States Court of Appeals for the Sixth Circuit, without formal written opinion, entered an ORDER AFFIRMING CONVICTION, said ORDER entered on November 5, 1974.

Petitioner has repeatedly, timely, and succinctly urged the inadequacy of the subject indictment, both orally and by written motion, prior to, during, and subsequent to trial on the merits in the District Court, and again by brief and oral argument in the Court of Appeals. Petitioner has urged the inadequacy of the evidence by Motion to Dismiss, Motion for Judgment of Acquittal, and Appeal to the Sixth Circuit Court of Appeals by proper written and oral argument at each point in the proceedings.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Sixth Circuit Court of Appeals affirming the Petitioners' conviction does not do substantial justice in this case and departs so significantly from the usual course of justice, or sanctions such action on the part of the District Court, by failing to require that the indictment charging Petitioners plead facts with sufficient particularity to apprise the Petitioners of the crime charged, enabling Petitioners to properly prepare for trial, and to secure to Petitioners protection against double jeopardy, as to require the exercise of this Court's power of supervision.

The Sixth Circuit Court of Appeals entered an Order Affirming the conviction of the Petitioners on November 5, 1974. This Order makes no statements of law and amounts merely to a holding that the indictment which is here questioned is, as a matter of law, in all respects sufficient to sustain the convictions of Petitioners. Said holding by the Sixth Circuit Court of Appeals is here challenged as not being in conformity with the law and as failing to do substantial justice in this case.

This issue of the sufficiency in law of the subject indictment further merits the consideration of this Court as the indictment is one alleging violations of Title 18, United States Code, Section 152, paragraph six: "Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or

the property of such other person or corporation. . . . Shall be fined not more than $5,000 or imprisoned not more than five years, or both," and further alleging a conspiracy, under Title 18, United States Code, Section 371, to violate paragraph six of Title 18, United States Code, Section 152. These Code provisions have peculiar impact on the small businessman and shopkeepers of our country, men harried by creditors and unable to see through murky economic waters, men striving desperately from month to month, with but their industry, credit, and faith to sustain them, to sustain their families and their good names. These men, the thousands of small businessmen at the core of our social existence, may "see", even contemplate, financial collapse if next month's "year-end sale" is a failure. Are these men then in contemplation of bankruptcy, or are these men free to pour effort and savings into an attempt to do "business as usual"? If these men fail and are subjected to the disgrace of facing criminal charges, will the law guarantee that an indictment charging them will meet the same Constitutional tests of sufficient specificity guaranteed to the robber and rapist? This indictment fails to uphold that guarantee. This indictment and the factual content of its allegations fail to comport with the Government's obligation to give fair notice of the alleged criminal acts and the Sixth Circuit has failed in its duty to establish guidelines for the Government in cases of this class and, further, has failed to render substantial justice in this case.

The basic law with regard to the sufficiency of an indictment is stated by this Court in the case of *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038 (1962), as follows: "The criteria by which the sufficiency of an indictment is to be measured are first, whether the indict-

ment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." This case also makes clear that "Although the language of a statute may be used in an indictment in the general description of an offense, it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." Finally, this case makes it abundantly clear that an indictment not meeting the above requisites is defective and will not support a conviction. That the foregoing statements of law in *Russell* are axiomatic has not forestalled the Sixth Circuit Court of Appeals from developing error in the application of the criteria is evident upon examination of the subject indictment.

Each count of this indictment, considered separately, as it must be, alleges the concealment of personal property, to wit: "household merchandise" or "other household merchandise." Clearly this omnibus description of the personal property alleged to have been transferred or concealed fails to meet that test of specificity established in *White v. United States*, 67 F.2d 71 (10th Cir. 1933), where the indictment charged the defendant with concealing "personal property" of the bankrupt. As the Petitioners in the instant case were officers of a bankrupt corporation engaged in the business of retailing "household merchandise", this indictment fails to allege with sufficient particularity the property Petitioners are charged with having transferred or concealed. The more recent case of

United States v. Arge, 418 F.2d 721 (10th Cir. 1969), also bears on this point by stating that "An indictment for concealment of assets in bankruptcy must, standing alone, allege the time and place, a description of the property concealed. . . ." This indictment by its lack of specificity with regard to the property alleged to have been transferred or concealed fails in its Constitutional duty to be sufficiently certain to enable the Petitioners to make a defense and to enable Petitioners to plead jeopardy if they should be indicted again on a similar charge, see *White*. Further, the Petitioners are, by the deficiency of this indictment, placed in the untenable position of guessing "what, if anything, the grand jury had in mind", see *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963), which Petitioners "could not be Constitutionally compelled to do."

A further glaring deficiency in this indictment is that each count therein tracks the language of the Code faithfully and alleges that the Petitioners "transferred or concealed." The sixth paragraph of Title 18, United States Code, Section 152 makes it a crime to be one who "knowingly and fraudulently transfers" or to be one who "knowingly and fraudulently conceals." The Government, by faithful, but non-discerning reproduction of the statutory language in the indictment has failed in its duty to clearly apprise the Petitioners of the crime alleged, as each count of the indictment by pleading in the disjunctive has charged the commission of two distinct crimes.

This ambiguity could easily have been circumvented by pleading in the conjunctive as "transferred and concealed" whereby proof in the disjunctive of "transferred or concealed" would have been sufficient to convict. It is well established that an indictment framed about the words of a

statute is insufficient when the indictment does not disclose the particulars of the alleged scheme or artifice to defraud, *United States v. Hess,* 124 U.S. 483, 8 S.Ct. 571 (1888); and again, "An indictment not framed to inform the defendant with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of a statute." *Russell.*

Closely related to the problem discussed in the above paragraph is the confusing phrase "such transfer being carried out by a truck" which is included in each count of the subject indictment. The Government, perhaps, intended this to be a qualifying phrase specifying which of the two crimes of "knowingly and fraudulently transferring" or "knowingly and fraudulently concealing" was intended to be charged. However, by adding the phrase they merely compounded the Petitioners' confusion as to which crime was being alleged, as a transfer is "an act of the parties, or of the law, by which the title to property is conveyed from one person to another." This definition of "transfer" is given by *Black's Law Dictionary, Fourth Edition.* Therefore, the Government's qualifying phrase, if it was intended to be such, essentially alleges a fact in furtherance of a concealment while stating the fact to be in furtherance of a transfer. The referenced phrase has no value, as it is ambiguous, and the indictment wholly fails to allege facts of a transfer or facts of a concealment as would clearly apprise the Petitioners of the alleged crime with which they were chargd. The omission of these facts makes the indictment defective. No essential element of the crime can be omitted without destroying the whole pleading. Further, the omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way or recital. *United States v. Hess.*

With regard to the conspiracy count, count six, of the indictment, the law is well settled that an indictment for conspiracy must clearly show that the act agreed to be done embraced all of the elements essential to constitute an offense. *United States v. Eisenminger,* 16 F.2d 816 (Dist. of Delaware 1926). The reason for the requirement that facts be pleaded which, if true, would prove each of the elements of the offense alleged to have been conspired about is clearly stated in *Eisenminger* to be the protection of innocent persons from vague charges of conspiracy, which charges are not specific enough in their factual basis to 1) allow the defendant to prepare a proper defense, and 2) allow the defendant to plead jeopardy to a subsequent indictment on similar charges. As this Court has held consistently that the omission of particular pleading of facts in an indictment is a matter of substance, not of form, *United States v. Hess,* this conspiracy count should be dismissed as insufficient to support a prosecution or sustain a conviction as it fails to specifically allege the facts, i.e. time and place, of an agreement between the Petitioners, and it further fails to specifically and unambiguously allege the facts of the intended object of the alleged agreemnt which would indicate to Petitioners with sufficient particularity the crime with which they were charged.

No good and sufficient reason exists for the failure of the Government to accord the Petitioners the benefits of their Fifth and Sixth Amendment rights to be tried upon an indictment that is legally sufficient in the facts alleged, rather than multifareous and vague as is the subject indictment. Only an exercise by this Court of its supervisory power can render substantial justice to the Petitioners in this case.

II.

The decision of the Sixth Circuit Court of Appeals affirming the Petitioners' conviction conflicts with decisions of other Circuit Courts by requiring that circumstantial evidence, comprised of facts which are compatible with the defendants' attempt to conduct routine business, of allegedly transferring or concealing assets in contemplation of bankruptcy, or conspiring to do same, be viewed in the light most favorable to the Government upon the defendants' motion for directed verdict or upon defendants' appeal of a conviction based on insufficient evidence. Only a definitive decision by this Court can reconcile the conflict between the Circuits.

Petitioners have been convicted of "knowingly and fraudulently and with intent to defeat the bankruptcy law transferring or concealing property of the bankrupt in contemplation of the filing of bankruptcy proceedings" and of conspiring to do same. Petitioners are businessmen whose business encompasses the movement of assets for subsequent retail sale. All of the evidence used to convict the Petitioners was circumstantial evidence. No direct evidence was produced to prove up the elements of a conspiracy. No direct evidence was offered to prove that a movement of assets occurred in other than the normal course of business.

That circumstantial evidence can so clearly encompass a point as to make its non-existence wholly improbable is not questioned. That circumstantial evidence is not robbed of its probative force by reason of not being direct, *United States v. Cole*, 416 F.2d 827 (6th Cir. 1969), cert. denied, is well established. That circumstantial evidence nee'

not negate every explanation incompatible with guilt appears to be settled, *United States v. Scales*, 464 F.2d 371 (6th Cir. 1972). But that circumstantial evidence, no piece of which is incompatible with innocence, must be viewed in the light most favorable to the Government when challenged by a Motion for Acquittal or Appeal from Conviction, *United States v. May*, 430 F.2d 715 (6th Cir. 1970), enters the realm of relative social utility.

This rule of the Sixth Circuit, *United States v. May*, acts to deprive a defendant of the right to a judicial determination of the sufficiency of the evidence to go to the jury. This judicial determination can, in a case arising under Title 18, United States Code, Section 152, where a businessman is proceeding in his usual and customary manner, walking down his normal path, and the issue becomes not is he walking down his normal path, but rather, does he at this point know where the path leads, become crucial. The harm inherent in the Sixth Circuit's rule with regard to the weight to be given circumstantial evidence when challenged by a defendant's Motion for Acquittal or Appeal of Conviction is clearly laid out in the Government's argument, before the Sixth Circuit Court of Appeals, to sustain the Petitioners' convictions.

The point is made that overt acts of a non-criminal nature can be circumstantial evidence of a criminal conspiracy, *United States v. Eisenminger*. Those same alleged overt acts can be susceptible of several divergent theories of the case and still support a conviction. *United States v. Morgan*, 469 F.2d 83 (6th Cir. 1972). Finally, the trial court and appeals court must view that circumstantial evidence in the light most favorable to the Government. *United States v. Saunders*, 325 F.2d 840 (6th Cir. 1964) and *United States v. May*.

The Sixth Circuit rule contained in the cases of *Morgan, May,* and *Scales* is that circumstantial evidence, comprised of non-criminal acts, capable of several interpretations, must be viewed in the light most favorable to the Government when challenged by the defendant. That rule makes any two businessmen who physically move assets and subsequently suffer an involuntary bankruptcy prima facie guilty of a conspiracy to conceal assets in contemplation of bankruptcy.

The rule of *Morgan, May,* and *Scales* is the Sixth Circuit rule and comprised the Government's argument, with regard to evidence, to sustain the Petitioners' convictions. The rule in the Seventh Circuit is that circumstantial evidence that property of a company approaching bankruptcy has found its way into the possession of another, while a suspicious circumstance, does not prove a conspiracy to commit a crime. *Bartkus v. United States,* 21 F.2d 425 (7th Cir. 1927). No mention is made of viewing that suspicious circumstance in the light most favorable to the Government.

At stake is the Petitioners' right to be acquitted if the Government is unable to produce proof legally sufficient to go the jury. The Sixth Circuit rule abridges that right. Only a definitive decision by this Court can reconcile the conflict between the Circuits.

CONCLUSION

For the foregoing reasons the Petitioners respectfully urge that this petition for the writ of certiorari should be granted.

Respectfully submitted.

JACK R. BAILEY
DICKERSON, BAILEY AND VELA
5100 Westheimer, Suite 100
Houston, Texas 77027
(713) 627-0252

Counsel for the Petitioners

December 1974

APPENDIX A

INDICTMENT

(Filed October 24, 1973)

COUNT ONE

The Grand Jury charges that on or about July 20, 1973, in Chattanooga, in the Eastern District of Tennessee, ROGER DUNLAP, and PAUL CUNNINGHAM, also known as PAUL DUNLAP, as officers of Tippens Furniture and Appliance, Inc., Bankrupt, Court No. 39,870, and in contemplation of the filing of bankruptcy proceedings against the Bankrupt, knowingly and fraudulently and with intent to defeat the bankruptcy law did transfer or conceal property of the Bankrupt, that is, two Admiral refrigerators, Basic-Witz bedroom furniture, two sofas, and other household merchandise, of a value in the amount of $500.00 or more, such transfer from Chattanooga to Pensacola, Florida, being carried out by a truck, driven by one Firman Mitchell, a further and more particular description of the property being unknown to the grand jurors.

(Title 18, United States Code, Section 152.)

COUNT TWO

The Grand Jury further charges that on or about July 20, 1973, in Chattanooga, in the Eastern District of Tennessee, ROGER DUNLAP, and PAUL CUNNINGHAM, also known as PAUL DUNLAP, as officers of Tippens Furniture and Appliance, Inc., Bankrupt, Court No. 39,870, and in contemplation of the filing of bankruptcy proceedings against the Bankrupt, knowingly and

fraudulently and with intent to defeat the bankruptcy law did transfer or conceal property of the Bankrupt, that is, living room furniture, bedroom furniture, electrical appliances, and other household merchandise, of a value in the amount of $500.00 or more, such transfer from Chattanooga, to Tampa, Florida, being carried out by truck, driven by one Bobby Wayne Stover, a further and more particular description of the property being unknown to the grand jurors.

(Title 18, United States Code, Section 152.)

COUNT THREE

The Grand Jury further charges that on or about July 23, 1973, in Chattanooga, in the Eastern District of Tennessee, ROGER DUNLAP, and PAUL CUNNINGHAM, also known as PAUL DUNLAP, as officers of Tippens Furniture and Appliance, Inc., Bankrupt, Court No. 39,870, and in contemplation of the filing of bankruptcy proceedings against the Bankrupt, knowingly and fraudulently and with intent to defeat the bankruptcy law did transfer or conceal property of the Bankrupt, that is, one Bassett bedroom suite, five sofas, five chairs, one Admiral color television set, and other household merchandise, of a value in the amount of $500.00 or more, such transfer from Chattanooga to Tampa, Florida, being carried out by a truck, driven by one Firman Mitchell, a further and more particular description of the property being unknown to the grand jurors.

(Title 18, United States Code, Section 152.)

COUNT FOUR

The Grand Jury further charges that on or about July 24, 1973, in Chattanooga, in the Eastern District of

Tennessee, ROGER DUNLAP, and PAUL CUNNINGHAM, also known as PAUL DUNLAP, as officers of Tippens Furniture and Appliance, Inc., Bankrupt, Court No. 39,870, and in contemplation of the filing of bankruptcy proceedings against the Bankrupt, knowingly and fraudulently and with intent to defeat the bankruptcy law did transfer or conceal property of the Bankrupt, that is, household merchandise, of a value in the amount of $500.00 or more, such transfer from Chattanooga to Tampa, Florida, being carried out by a truck, driven by one Charles Lee Myers, a further and more particular description of the property being unknown to the grand jurors.

(Title 18, United States Code, Section 152.)

COUNT FIVE

The Grand Jury further charges that on or about July 24, 1973, in Chattanooga, in the Eastern District of Tennessee, ROGER DUNLAP, and PAUL CUNNINGHAM, also known as PAUL DUNLAP, as officers of Tippens Furniture and Appliance, Inc., Bankrupt, Court No. 39,870, and in contemplation of the filing of bankruptcy proceedings against the Bankrupt, knowingly and fraudulently and with intent to defeat the bankruptcy law did transfer or conceal property of the Bankrupt, that is, two couches, one love seat, four chairs, a console stereo, and other household merchandise, of a value in the amount of $500.00 or more, such transfer from Chattanooga to Tampa, Florida, being carried out by a truck, driven by one Paul Jefferson Worley, a further and more particular description of the property being unknown to the grand jurors.

(Title 18, United States Code, Section 152.)

COUNT SIX

The Grand Jury further charges that from on or about July 20, 1973, and through and including July 27, 1973, in the Eastern District of Tennessee and elsewhere, ROGER DUNLAP, and PAUL CUNNINGHAM, also known as PAUL DUNLAP, the defendants, did willfully and knowingly combine, conspire, confederate and agree together with each other to commit the following offense against the United States:

1. With unlawful and fraudulent intent, as officers of Tippens Furniture and Appliance, Inc., Bankrupt, Court No. 39,870, and in contemplation of the filing of bankruptcy proceedings against the Bankrupt, and with intent to defeat the bankruptcy law, did transfer or conceal property of the Bankrupt, that is, certain electrical appliances, and other household goods (a partial list of which is attached to this indictment) of a value in the amount of $5,000.00 or more, in violation of 18 U.S.C., Section 152.

OVERT ACTS

In furtherance of the conspiracy and to effect the object thereof, the defendants performed the following overt acts:

1. On or about July 20, 1973, ROGER DUNLAP ordered Firman Mitchell to deliver a truckload of household merchandise from Tippens Furniture and Appliance, Inc., to Pensacola, Florida.

2. On or about July 23, 1973, ROGER DUNLAP ordered Firman Mitchell to deliver a truckload of household merchandise from Tippens Furniture and Appliance, Inc., to Tampa, Florida.

3. On or about July 25, 1973, ROGER DUNLAP contacted PAUL CUNNINGHAM by telephone in Tampa, Florida, informed him of the arrival of the State-appointed receiver at the store, and was told by PAUL CUNNINGHAM to leave the store and proceed to Florida.

4. On or about July 25, 1973, PAUL CUNNINGHAM offered $500.00 to truck drivers who would return to Tippens Furniture and Appliance, Inc., in Chattanooga, from Florida, and bring him another truckload of good furniture.

5. On or about July 20, 1973, PAUL CUNNINGHAM ordered Bobby Wayne Stover to deliver a truckload of household merchandise from Tippens Furniture and Appliance, Inc., to Tampa, Florida.

6. On or about July 25, 1973, ROGER DUNLAP and PAUL CUNNINGHAM supervised the storage of a truckload of household merchandise from Tippens Furniture and Appliance, Inc., in a warehouse at or near Tampa, Florida.

7. On or about July 24, 1973, PAUL CUNNINGHAM supervised the unloading and storage of a truckload of household merchandise from Tippens Furniture and Appliance, Inc., at a warehouse at or near Tampa, Florida. (Title 18, United States Code, Section 371.)

/s/ JOHN L. BOWERS, JR.
UNITED STATES ATTORNEY

A True Bill:

/s/ (signature)
FOREMAN

List Attached to Indictment

[8] 1—One Admiral Duplex Refrigerator, Serial Number 04060708, model number ND2238
2—One Admiral Duplex Refrigerator, serial number 04079795, model number ND2038
3—One roll of shag carpet, 12′ x 103′, on which wrapper has following numbers, 45786B, 6551, 219
4—One Philharmonic Spinet piano, serial number 37412
5—One gold overstuffed couch, one gold overstuffed chair, one gold Ottoman, all of which match
6—Two tan lamp shades
7—One folding ping-pong table in carton, By Belknap, Inc., address Tippens Furniture and Appliance, 4910 Rossville Boulevard, Chattanooga, Tennessee

[9] 8—Ten cartons, each containing a mirror bearing address of Tippens Furniture and Appliance Company, Chattanooga, Tennessee
9—Two small walnut lamps table, one in each carton
10—Two matched brass table lamps
11—One 30″ x 38″ picture in gold frame from Illinois Moulding Company, Chicago, Illinois, depicting a woman and a man
12—One night stand in carton, pattern number 445, manufactured by Red Lion Table Company and shipped to Tippens Furniture and Appliance Company, Chattanooga, Tennessee, order number 82427
13—One headboard in carton, pattern number 456, manufactured by Red Leon Table Company and shipped to Tippens Furniture and Appliance Company, order number 82427
14—Two oak finished mirrors in a carton, manufactured by Red Lion and shipped to Tippens Furniture and Appliance, Inc., order number 82427

15—One double dresser in carton, pattern number 4566, manufactured by Red Lion and shipped to Tippens Furniture and Appliance, Inc., order number 82427
16—One chest in carton, pattern number 452, manufactured by Red Lion and shipped to Tippens Furniture and Appliance, Inc., order number 82427
17—One bassut octagon coffee table, walnut finish
18—One Bell & Howell Monic Projector, model number 16232, serial number 3128087, in carton
[10] 19—One Bell & Howell Movie Projector, model number 16232, serial number 3128006, in carton
20—One Bell & Howell Slide Cube Projector with remote control, model number 977Z, serial number 306052, in carton
21—One Bell & Howell Zoom Movie Camera, model number 672, serial number 136105, in box
22—Four Radial Michelon white side wall tire, size 225-15
23—One Philco Huskie Air Conditioner model number AH23M4, serial number 1MM63131, in carton
24—One Welbilt Air Conditioner, model number 4909, serial number 151157, in carton
25—One Philco color television, in carton, chassis number 2C480B, serial number 084081
26—One Admiral 19″ color television in carton, model number 19T558, serial number FC0621078
27—One Admiral color television, model number 5L5711, serial number C0618121
28—One Admiral Entertainment Center, model number 5ST5353, serial number C0566945, in carton
29—One Philco color television, serial number 511226, model number C7250AWA, in carton
30—One Philco color television, model number C7250AWA, serial number 511222, in carton

[11] 31—One night stand, pattern number 455, manufactured by Red Lion Table Company, and shipped to Tippens Furniture Company, order number 82427
32—One Bassett End table bearing number G245-605
33—One lighted oriental wall plaque IBM number WP32935
34—One lighted black oriental wall plaque in carton
35—One empty furniture carton from the Weiman Company, Ramseur, North Carolina, reflecting the consigner as Tippens Furniture and Appliance, Inc., Chattanooga, Tennessee, order number 5-2-73, listing style as A996 estate

[ ] One Burlington House chest, 324-250, acknow. number 66682; customer number 87655; load number 529
Two night tables, 324-400, Burlington House
One Burlington House dresser base, model 324/325-140
One satin finish tole lamp, model 38515, orange in color
One Acme walnut lamp, model 9835
One Larwin lamp (broken), model 279, brown in color
One gold and cream statuette of mother and daughter
Two C. B. Atkins Co. side chairs, model 2-4841, brand—Gaines
One Gaines server, model 4810
One Gaines buffet, model 4820
One Gaines side chair, model 2-4841
One Admiral oak grain color television, model 515853, serial number FC0629629
One Gaines pedestal base, model 4831
One Gaines china desk, model 4816

[11] Three printed pictures and frames by Windsor, size approximately 30″ by 38″
One double bed size mattress, yellow with red flowers
One Kestell pool table
One Gaines china desk, model 4825
One Burlington House 4 by 6 headboard, model 324/325-322
* Admiral refrigerator-freezer, model NT1737, serial number 04102703
* One Admiral automatic washer, model LWA1839 AV, serial number 03014345
* One Philharmonic piano, number 36973
One Admiral automatic dryer, model LDE1838
One Murray 7 hp three-speed riding lawn mower, model 170702
One Virginia house chair (wooden), model 2287487
One Bassat aluminum glass top table, model 7882-75
One Brady end table, pine, model 2213
One Belknap folding table, model 7775111
One double bed mattress and box springs set
One Brent wool, gold braided rug (three pieces)
One H. B. Co. bar contemporary model 14836KBO
One Carlson white rocking chair, number 2192
One 3′ by 5′ seascape picture, number 264

[12] One Brady pine cocktail table, number 66
One Brady sofa style settee
One basic Witz mirror, number 13-080
Four Virginia house chairs, number 2293
One Eureka vacuum, model 2082A
Two portable television stands
One box with three lamp shades
One Classic gold and white love seat, model 102LS
One brown and white Classic sofa, full size
Manning Bowman electric fan, model 205041
Custom built, (Marshal's Inc.), green and white sofa (full size)

One Virginia house chair, model 2287/487
One Classic ottoman, number K151020, gold
* One Strato lounger-rocker, white naughyde, number 54514383
Four Cap 'n Knap boat cushions (USCG app) green
Three flowered bedspreads
Three king-size pillows
One Gott five gallon water cooler
* One 3 horsepower Briggs and Stratton go-cart, serial number D128781
One Classic chair, number J-1033-17, gold

[13] One Classic chair, number J-1033-19, green
One Custom built (Marshall's), green and white chair
One clear sway lamp, style 1000
One classic sofa, gold and white
One Monigue queen size bedspread, green, number 8300
One Grillo Italian telephone (white plug-in style)
One Linden eight-day striking wall clock
One Weltron 2005 home entertainment system (stereo)
Seven miscellaneous lamps
Four miscellaneous lamp shades
One Bell and Howell slide projector, number 981Q
One Classic love seat, brown and white.
One Stratford sofa, gold striped.
One Stratford love seat, gold striped.
Two Thomasville night stands, number 4251-820.
* One Admiral Microsonic electronic oven, number 2436.
One note pad of paper with indented writings on top page.
One green plastic bag containing several paper-back books.
One men's schick styling dryer.
One "the name caller" automatic telephone dialer.

[14] **Ted John Prin assorted kitchen knives.**
One Martinni fish filet knife.
One Western fish filet knife.
One Arrow T-50 staple gun.
One General Electric portable professional hair dryer.
One folding walnut wine bottle rack.
One French syle telephone.
One RCA indoor antenna, number 10X203.
One Paragon key-wind clock, number 3073182.
One Paragon steeple clock, number 30517.
One large lamp.
One 40' x 40' picture print.
One Bell and Howell movie projector, number 1620.
Two Cameo cookware set, number 348-88 and 848 -86.
One Smith-Corona-Coronomatic 2200, portable electric typewriter.
One General Electric portable mixer, number M67.
One gold and white pedestal, 30 inches high.
One Southland lawn mower, number 32320.
One Bell and Howell movie projector, number 16232.
One coke box containing miscellaneous drinking glasses and plastic container.

[15] One Early Times box with miscellaneous ladies clothes.
One Murphy cedar chest, number 340, containing: Four pool cues; one True Temper spinning casting reel, number 337; one silver serving tray, 12" x 24".
One oval mirror and frame approximately 40" x 30".
One coke box containing corning ware.
One box containing miscellaneous men's clothes and business cards.
One box containing miscellaneous clothing.

One Bassett "shelf on top", number 3476.
One Vaughn bookcase, 100-19.
One model number 777 5111.
One headboard for bed.
One table base, 19 F 200.
Two black cloth raincoats.
Three sports coats (men's).
22 men's shirts.
Six men's pants.
11 ladies apparel.
* One Admiral television, 0629870.
One King Fisher fryer.
One fold-a-phone (telephone).

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[16] One box of Smith-Corona-Coronomatic typewriter cartridges.
One box Empire side chair (2 number 9000-40).
One roll Monticello carpet (green shag).
Four Mustang cugs (cue sticks).
Three boxes (one each) console, model 226, sewing machine.
One "the name caller" (automatic telephone dialer.
One silver cordial set (W & S Blackinton Company).
One box of Billiard life timer barbells.
One Gott 48 quart ice chest.
* One Eureka, model 2082, vacuum cleaner, serial numbers 7195413 and 7195720.
One Empire night table, model E-440-8.
One Hooper's sewing machine.
One Dayton vertical bond saw 1-3Z365.
One box lamp tippin 4 1236 2-A & 2-CR.
One Dayton 15" Commercial Drill 3Z325.
One box E 9000 41 Empiro arm chair.
One Box = 9000 23 Hutch top.
One E-440-5 Armour Crown.

* One Eureka model 770 A sewing machine (serial number 7199493)
One Murray lawn mower, model 3-3013.

[17]
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One box Basic-Witz bedroom & dinning furniture (Dreser).
One box Thomasville Dresser B-40.
One Colonial model 6000 (glass).
One box Chamber med. lamp shade white.
Two boxes miscellaneous purses, clothing, personal items.
One box stereo component tables.
* One Helco model 800 No. 30565543.
* One air conditioner U4063, model A142CR1B.
One box miscellaneous kitchen utensils.
One box miscellaneous clothing.
Two plastic bags miscellaneous purses and shoes.
One box beauty bar product and miscellaneous loose parts.
* One roll carpet B of L 041616 (lt. green)
One roll carpet (brown and black)
One roll indoor/outdoor carpet (brown and green)
One Zenith portable television, model C2003.1 number 3271116.
One box spring and matching mattress (brown).
One large box miscellaneous clothing.
One television Admiral portable color.

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One #347-1 mirror.
One headboard (walnut)
One beige fur reclining chair.
Two candle holders and set (Bassett Mirror Co.)
Two candle holders and set (Bassett Mirror Co.)
* One picture gold frame—IBM V908202707 (Girl at Path Door)
* One picture IBM #B602483534—Claudia 30" X 38"

* One picture IBM #V90824707MAN—White Golden Helmet
Two queen size bed frames #861-1, fits 3-3 42 inch 4-65/6 width
One bed frame in brown unmarked box
One box miscellaneous decoration in Allied Van Box
One box containing three bar stools tops and two bottoms white in color
One box silver tray (126)
One box with two bar seats no bottom
One chest in long box, 4251-331, shipped to Tippens Furniture
* Two night stand #71200J0B814 in brown box
One box miscellaneous household silverware,

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Invoice 81564
One box—door night stand 3476-5/73
One table top walnut
One box miscellaneous bedding and kitchen utensils
One box with lamp shade
One box containing piano seat
One white Electric stove—Roper
* 1-BSR Record player MacDonald 310 Model 310X B3023
* 1-8 track stereo electrophonic serial number F31111 Red number 6058, model T800
1 blue rocking chair, brand name Classic
One white rocking chair, brand name Classic
One walnut dresser, article 714, Coleman Mfgr., price $488.00, approximately 6 length, 1-½ wide
One pecan dresser, Bassett, number 2762-217-R, dresser—JOB-13-W-ALSTRIA
One upright chest, 5 drawers, number 2762-251-5DR-JOB-13-W-ALSTRIA—pecan
One classic red chair
one speaker—Model 66, Walnut

[20]
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1 Philco Stereo Record Player, approximately 5½" long, Model H462AMD, Serial number 394556
2 speakers Walnut (used) no name
2 Panasonic speakers, model number SB55D
1 speaker made in Japan (walnut)
1 speaker, Walnut no name
1 night stand, Article 714, Coleman manufacture $79.50, #869, walnut
1 dresser mirror 5½' tall, 3' wide, pecan
* 1 dresser mirror #2564-215 in back, 4' tall, 18" wide.
* 1 yellow Admiral dryer, model LDE1835-HG, serial number 03036911
* 1 yellow Admiral Wash Machine, Serial number 03016742, model LWA1835HG
1 headboard for bed 2762 199 5/0 C.B. HB. J13W, Alestria, Blanca, Pecan
1 headboard bed 4/6714 36.
* 1 portrait 30 x 38, Moonlight Galleons, IBM #V908133764
* 1 Electrophonic 8 track stereo model T800, serial number F31-1-10-Red #0544
* 1 G.E. record player, radio, model P960, serial number H25036.

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1 night table, #714-047, finished pecan, price $79.50
1 speaker American Walnut, model 66
1 speaker, Midi Japan—Walnut
* 1 solid state stereo player—Commodore, model XL1-240, serial #72122862
* 1 Electrophonic 8 track stereo, serial #ID1071101, model #T700
1 Electrophonic 8 track stereo, model T800, serial #A31-1-10, red #22-92

1 speaker, walnut, no brand, #11-12184
2 speakers wrapped in celophane, made in Japan
1 record player, Electrophonic Model B36.
One box of lamps and pillows
One box Gourmet stock pot and cove
One Cameo cookware set
One table top bottom
One silver serving platter
One box headboard; Basic-Witz
One box table base from Ketzel Furniture Co.
One box silverware set
One two door Admiral Refrigerator
One solid state radio

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One jar containing miscellaneous coins
One silver cook set
One box lamp shade
One box of 2 candle holders
One Eureka vacuum cleaner
One frying pan with lid
One Ardmore upright dresser
One Virgin House hutch
One Bassett Dresser
Two box of china cup, dishes
One box Jack Daniels clothing
One box silver punch bowls and cups
One box miscellaneous office equipment
One box plastic table and pillows
One box twin bed box springs from Billings
Two mirrors #4251-230
One dresser mirror 2564-215 on back approximately 4 feet tall, 18″ wide
One classic greenish rocking chair
One classic love seat, yellow & green pattern
One classic couch, yellow & green pattern
Three separate couch pillows, yellow & green pattern

[23]
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* One Electrophonic record player, black in color, part #11-11401, serial number 521282
Two lamp (hanging lamp) Swag-lite
One upright dresser—2 doors, pecan
One Armorice—Job 807 - 72 - 150 (Levitz)
One dresser 13040 (Levitz)
One picture 46 x 24
One picture (Outdoor Landscape) approximately 3 x 5 gold plastic frame (Western Scene)
One Mucho Mas Velvet Headboard
13 cue sticks made in Japan
One Bassett dresser
One electric stove—Roper (white in color)
One gas stove $188.80, Webilt 4 Burner-white
One Admiral Duel Temp. Refrigerator, white six feet tall
One record player BSR—New
One Bell & Howell 977Q slide projector
One box miscellaneous pots and pans, Allied Van Line, #B200381, 127
One box of miscellaneous new ash trays
One box Thomasville headboard

[24]
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One box women's clothing
One Samsonite suitcase Paul Cunningham
One Samsonite suitcase Paul Cunningham
One Delta Airlines suit bag
One grandfather clock
Six Take and See cake pans, lemon yellow
One tea set
One Princess 5000 telephone
One sport craft table tennis set
Four pair women's used shoes
Two silver serving trays
One Oxford bed quilt

Two Norman table lamps
Two Springmaid sheets
One Springmaid pillow case
One Belknap gas grill patio base
One Raimond silver tray
One silver tea pourer
One Tempus Fugit wall clock
One Set Quality bronzeware of North Kingston Rhode Island Bronzeware
One silver punchbowl

[25]
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One wood and leather stool, style 125 Wal.
One silver serving tray #240
One set La Reine china
* One Admiral Refrigerator, serial #04052045
One six piece tea set including tea kettle set
One Oriental bronze knife and fork
One Bohemian crystal set
One Anchor Hocking Fire King Oven Ware Set
Two King Design bronzeware
One box napkin holders
Three boxes of 29 piece Bar B Que set
One King design bronzeware
One Pyrex baking set
One silver chafing dish
One Anchor Hocking fire king oven ware
Four bed rails, metal
One silver punch bowl set
One Empire mirror 9000-2
One metal fry pan
One metal sauce pan
One Vaughn 100 mirror
One box Ability lamp

[26]
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One Empire night table E-440-8
One Empire mirror 599-2 mirror

* Michelin tire serial #YWH19173B
* Michelin tire serial #YWH20764B
* Michelin tire serial #YTH54990G
* Michelin tire serial #BWH20380C
King Size American Natural Posture Health-O-Pedic matress
Queen (or Reg.) Size American Natural Posture Health-O-Pedic matress
Two box springs, twin beds, no brand
Box spring, reg. size bed
Two sets bed frames
* Admiral color tv C-0515989, oak grain
* Admiral color tv C-0482442, pecan grain
Admiral color tv, invoice #1540, T shipped via 6/8/73
One dix foot cabinet in box, Natatian Empire Manufacture E-450-7 Armoure
* One Dayton 22″ rotary lawn mower #3-Z-465
One night table white with blue trim, in a fruitwood, carton #E/573-8

[27]
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One green speedway motor cycle in carton
Night table, fruitwood, carton #E/573-8
One E/450-8 night table, Empire Mfg.
One E/9000-8 night table
One E-450-2 mirror, Empire Mfg.
One E/9000-8 night table
One black office chair-High Point, N. C. on May 23/73
Three sets bed Frames (Americana)
One Vaughan corner desk
Bachelor chest by Vaughan at VA
Three Michelin 215 x 15 size tires
Four lamp shades in box
* One Admiral refrigerator freezer #00940189BM
One gold chair with seven Cushions
One four foot lamp in carton/by Ability

One Statesville chair
One yellow sleeper/striped brown and white with three cushions
Five lamp shades two green, one white, two black
One Divan-Flowered pattern, yellow, white, green

[28]
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One Admiral ice maker Kit #LK73-G
One Admiral ice maker Kit #LK72-F
Two rolls Monticello carpet from Carpet Mills 12 x 90
Carpet from floor covering Specialists—Bolero 12′ x 71′
Two life boat cushions
One multi color bedspread
Two painted pictures in frame (boxed)
Four painted pictures in frame (boxed)
One Naughahyde chair—red
Four cabinet doors, boxed from Fidelity Products Co., Minneapolis, Minnesota
Portable TV stand brown
One Diningroom Chair, Statesville Chair Co., Statesville, N. C.
One mirror 5-99-2 (Empire)
One mirror E450-2 (Empire)
One mirror E9000 (Empire)
One mirror E440-2 (Empire)
12 packing quilts
One Premier upright accessory kit

[29]
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One Naughahyde sofa—red
One Black & Decker saw 7-¼″
* One box containing merchandise from FRANK M. KATZ, Inc., invoice #J15086
One Upright Vaughan book case
One chest on chest by Empire
One dresser by Empire E9000-3

One roll of carpet, green
One side chair, box #2-9000-40
One headboard by Empire E9000-12
One roll of carpet—green
6 x 6 bed by Empire
One dining room chair, 9-000-41
One carton E-450-12 bed 6 x 6
One buffet by Empire #-9000-22
One aluminum gas Gewku GC990
One foot stool
One night table E450-8
One single dresser by Vaughan 100-10
One utility cabinet by Vaughan 100-14
One double pedestal table E900-33

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One Jouk Sport made in France
Table base by Empire E9000-31
Three consolodated sewing machine tables
Two Hamilton-Lightning Go-karts
One Philharmonic piano with cover
Admiral Solar color TV with cover
One sofa with 9 cushions yellow/gold
Schweiger living room chair with 2 cushions
Classic living room chair with one cushion
Dresser by Empire
One Executive table
One gold trim mirror
One yellow chair with 2 cushions
One master bedroom dresser
One box E440-5 Ardmore
One box E450-7
* One Dayton Shap Vacume #3Z034
One Johnson and Johnson First Aid Kit
Two lamps black with gold trim, Maisontole
* One Simroc Electric water cooler #169104
One gas grill patio base
One under counter dishwasher Admiral

DH2434
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One Gallon water cooler
One Walten Excersize equipment
One Roper auto stove
One King Fisher—trier
One gold couch
One multi colored couch
Two sets gold drapes
One green shower curtain
One box containing Paragan Fashion Clocks
One Safe on Dolly
One Admiral portable TV
One green picnic matress
Three Coilerator air conditioners, model A. A202 CR. B. A202CR, C. A202CR
One box containing Crystal Tips Ice Equip.
One box containing furniture
One box containing pedestal basis #4PC88
One white chest with cover. Fruitwood top E-573-6
One Bicor Charisma 8 track phono with cover
One bait pail
Two wire bait parts

[32]
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One twisted oval wire basket
One Winston mirror
One wall piece box #1053
One wall piece trim Winston box 1053
Two groups of salesman order books
One Smith Corona typewriter. portable
One Dayton drill press base
One sharp 10" portable TV
One carton (Unmarked for Herman Cupper New York)
One Admiral super solar color TV
One carton 30 pars with shears for Wiss

One Carton miscellaneous items
One carton glass Early American scenes
One carton advertising from Belkncup, Inc.
One box bed clothing
Two Spalding tennis rackets
Two pillow cases containing miscellaneous clothing
Two Smith Corona 2200 electric typewriters
One box from FRANK MC KATZ J15086
One shearing kit
One Bell-Howell projector

[33]
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Three sets speakers
One Sears adding machine
One Mirrormatic coffee maker
One set silver salt and pepper shakers
One portable sewing machine, white case
One Bell and Howell movie projector
One carton with four reels, cigarettes, tennis balls
One folded table in carton

APPENDIX B

MOTION TO DISMISS INDICTMENT

(Filed October 31, 1973)

TO THE HONORABLE JUDGE OF SAID COURT:

Come now the Defendants, ROGER DUNLAP and PAUL CUNNINGHAM, a/k/a PAUL DUNLAP, and move the Court to dismiss counts one through and including six of the Indictment now pending against them and for cause would show:

1. Counts one through and including six are wholly and fundamentally insufficient in that they fail to state an offense pursuant to the Statutes of the United States of America.

2. Counts one through and including six are wholly and fundamentally insufficient in that they fail to comport with proper rules of pleading pursuant to indictments.

WHEREFORE, PREMISES CONSIDERED, these Defendants and each of them move this Honorable Court to dismiss the indictment now pending herein against them.

Respectfully submitted.

/s/ JACK R. BAILEY
Jack R. Bailey
Attorney for Defendants
316 Houston 1st Savings Bldg.
Houston, Texas 77002
(713) 224-5592

(Certificate of Service)

APPENDIX C

ORDER OVERRULING MOTION TO DISMISS INDICTMENT

(Filed November 15, 1973)

The defendants have moved to dismiss the indictment herein for failure to state an offense. No brief has been filed in support of the motion as required by local rules. Having considered the motion, the Court is of the opinion that it is wholly without merit.

It is accordingly ORDERED that the defendants' motion to dismiss the indictment be and the same is hereby denied.

ENTER:

/s/ FRANK W. WILSON
United States District Judge

Filed December 14, 1973
Ord. Bk. 10 P. 112

Karl D. Saulpaw, Jr., Clerk
by /s/ C. Lloyd,
Deputy Clerk

APPENDIX D

VERDICT FORM

(Filed December 14, 1973)

(1) As to Count One of the indictment, we, the jury, find:

(a) The defendant, ROGER DUNLAP, /s/ Guilty; (guilty—not guilty) and

(b) The defendant, PAUL CUNNINGHAM, /s/ Guilty (guilty—not guilty)

(2) As to Count Two of the indictment, we, the jury, find:

(a) The defendant, ROGER DUNLAP, /s/ Guilty; (guilty—not guilty) and

(b) The defendant, PAUL CUNNINGHAM, /s/ Guilty (guilty—not guilty)

(3) As to Count Three of the indictment, we, the jury, find:

(a) The defendant, ROGER DUNLAP, /s/ Guilty; (guilty—not guilty) and

(b) The defendant, PAUL CUNNINGHAM, /s/ Guilty (guilty—not guilty)

(4) As to Count Fourt of the indictment, we, the jury, find:

(a) The defendant, ROGER DUNLAP, /s/ Guilty; (guilty—not guilty) and

(b) The defendant, PAUL CUNNINGHAM, /s/ Guilty (guilty—not guilty)

(5) As to Count Five of the indictment, we, the jury, find:

(a) The defendant, ROGER DUNLAP, /s/ Guilty; (guilty—not guilty) and

(b) The defendant, PAUL CUNNINGHAM, /s/ Guilty (guilty—not guilty)

(6) As to Count Six of the indictment, we, the jury, find:

(a) The defendant, ROGER DUNLAP, /s/ Guilty; (guilty—not guilty) and

(b) The defendant, PAUL CUNNINGHAM, /s/ Guilty (guilty—not guilty)

/s/ TOM SPRINGFIELD
Jury Foreman

APPENDIX E

DEFENDANTS' COMBINED MOTION FOR JUDGMENT OF ACQUITTAL AND DISMISSAL OF INDICTMENT WITH MEMORANDUM

(Filed December 20, 1973)

TO THE HONORABLE JUDGE OF SAID COURT:

Come now Roger Dunlap and Paul Cunningham, Defendants, and within five (5) days after the jury was dismissed, request Judgment of Acquittal or in the alternative, request that the Court dismiss the indictment against them in this case, and as grounds would show:

1. As the Court will see, this Motion is a combined Motion for Judgment of Acquittal and Motion for Dismissal of Indictment, for at this point in time the law, facts and logic connected with one bear heavily on the other;

2. All previous motions to dismiss the indictment and/or for Judgment of Acquittal, whether written or oral, heretofore tendered by Defendants are incorporated herein by reference as fully as if copied herein verbatim;

3. This Motion is filed as a reiteration and re-urging of prior motions for dismissal of indictment and/or for Judgment of Acquittal, and as the matters complained of in such prior motions and in this Motion affect the substantive rights of the Defendants, this Motion is also submitted as an original motion;

4. The counts of the indictment are fatally defective, and should be dismissed for the following reasons, or any of them:

(a) They fail to allege the "method" of both the alleged concealment and/or transfer;

(b) The property of the bankrupt therein described Defendants' Motions for Acquittal and Dismissal was either not described with requisite specificity and/or the evidence adduced at trial regarding such property was totally insufficient; or so broad as to preclude the Defendants' raising jeopardy at subsequent trials;

(c) The proof offered at trial was at variance with the allegations of the indictment;

(d) The evidence offered at trial was totally devoid of proof concerning any "transfer" as per jury instruction;

(e) On its face, the indictment improperly attempted to define "transfer";

(f) Count six of the indictment fails to state an offense;

5. The evidence was insufficient to sustain the verdict;

6. The indictment fails to comport with Criminal Rule 7(c);

It is settled law that the criteria for indictments are, first, whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the Defendant of what he must be prepared to meet, and, secondly, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Russell v. U. S.*, 369 U.S. 749,

82 S.Ct. 1038, and see *Van Liew v. U. S.*, 321 F.2d 664 for a comprehensive discussion of the law of indictment; also *White v. U. S.*, 67 F.2d 71. The reasons for the above-stated rules become glaringly apparent when applied to the instant case.

The Court is again reminded that the offenses specified in the first 5 counts were pled only in statutory terms, and failed to plead the offense with the clearness and necessary certainty to apprise the accuseds of the crime with which they stood charged. Every ingredient of which the offense was comprised was not accurately and clearly alleged.

Regarding counts 1 through and including 5, specifically referring to "concealment" and "transfer", taking "concealment" first, what was the "method" of concealment, as proved by evidence? Was it, and did the jury find, it commenced with the loading of the furniture and ended with the storage in the warehouses? Or was it only the storage in the warehouses? Or was it loading on the trucks? Or was it the unloading? What happens if at the next grand jury session the government indicts the Defendants for "concealing", and alleges "did conceal by loading or caused to be loaded property of the bankrupt on board a semi-trailer truck and thereupon removed to (Pensacola or Tampa) and thereupon unloaded and stored in a warehouse"? What happens if they are indicted and the mode of concealment is alleged "by removing from Chattanooga and hiding same in a warehouse in (Pensacola or Tampa)"? Can they then raise a plea of jeopardy with reference to this case? We think not. There is no way we can know of what mode of concealment the jury may have found the Defendants guilty, for the method was not pled in the indictment.

Why is this so serious? Jeopardy, the jeopardy aspect. As the method of concealment was not alleged at all in the indictment, a plea of jeopardy would be extremely difficult, if not impossible, for the Defendants to raise in subsequent prosecutions for concealment. The Court will also note that assuming the concealment was a continuous thing, commencing with the loading in Chattanooga and ending with the hiding in a warehouse in Pensacola and/or Tampa, then the situs of the concealment is not accurately pled. The *place*, or situs, that the crime occurred may have something to do with venue, but proper venue does not prove the place of the crime. It would appear that the government relies on its venue pleadings in the indictment to also suffice for *the place of the offense*. If so, the evidence totally failed to show a "transfer" in Chattanooga, and at best may have shown "concealment" if the loading onto the trucks was the concealment—that was the only proof of any possible concealment in Chattanooga, in the Eastern District of Tennessee—however, as the method of concealment was not alleged in the indictment we cannot know if that is what the jury found the Defendants guilty of. Here again, how could the Defendants raise a plea of jeopardy on subsequent indictment?

Regarding transfer, what if the Defendants are indicted for "transferring" again? Assuming there was evidence of a transfer, which we deny—how was it done? How did the jury find it was done? We can't tell because the method of transfer was not at all alleged. What if the Defendants are indicted next week for "transfer of property of the bankrupt, by giving (or selling, or trading) such property to one Mr. X, of Pensacola, Florida"? (Note, then you have both place and venue problems.)

It should go without saying that in order to show a transfer, the transferee must be identified in the indictment, or minimally, a transferee must be indicated. The Court properly charged the jury as to "transfer", thus it is a legal impossibility that the jury could have found a transfer per the indictment as absolutely no transferee by name or otherwise, is indicated in any count, and as a matter of law a transfer requires a transferor and a transferee. See Blacks Law Dictionary, Fourth Edition, which defines transfer—"an act of the parties, or of the law, by which the title to property is conveyed from one person to another". *Note*—from one person to another—transferor, transferee. Where in the indictment is there any reference to a transferee? Where in the evidence was there any evidence as to a transfer, transferee or otherwise? There was *none*, absolutely none, unless the Pensacola load could be considered transferred—but even here, the indictment fails to state to whom or what transferred. Both indictment and evidence fail to state "how" transferred, that is by sale, gift, exchange or whatever. Thus, the Court must conclude that the jury could not have convicted the Defendants of "transferring". The Court will note that in the event the phrase "such transfer from Chattanooga to (Pensacola, Florida, Tampa) being carried out by truck", etc., was intended by the government to be a statement of the method of the transfer it is clearly misstated as a matter of law, as is reflected by the Court's own charge to the jury.

Regarding the property description, indictment and proof the Court will note:

Count 1—referred to 2 Admiral Refrigerators, Basic-Witz bedroom furniture, two sofas and other household merchandise, etc. This writer implores the Court to look

at the evidence, look at the FBI inventory for Pensacola, Florida. That evidence clearly reflects *no* Basic-Witz bedroom furniture, *no* sofas, but it does reflect:

> 1 Admiral Duplex Refrigerator, serial number 04060708
> 1 Admiral Duplex Refrigerator, serial number 04079795 model number ND 2038;

So at least the evidence showed two Admiral Refrigerators of adequate description. The problem, however, lies again in the indictment—the indictment fails to specifically define the Refrigerators. It is conceivable that the jury, *pursuant to the Court's charge to the jury* (remember—the jury was instructed it could find *any* property described in the indictment), found that only *one* of the Refrigerators was transferred or concealed. But which one? Again, if the government indicts the Defendants for a specific refrigerator, how can jeopardy be raised? Regarding "other household furniture" in any of the counts, how can the Defendants raise jeopardy on a subsequent indictment which accurately describes any given item? Note the well-known legal concept that the general is governed by the specific—in all probability subsequent prosecutions would lie if the indictments were specifically pled, with no adequate means for the Defendants to raise jeopardy by virtue of this proceeding. Again, the general, and with few exceptions, of which the present case is not one, the universal rule, on this subject, is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and

the charge must be made directly, and not inferentially, or by way of recital. *U. S. v. Hess,* 124 U.S. 483, 8 S.Ct. 571.

Count II—referred to "living room furniture, bedroom furniture, electrical appliances and other household merchandise". The Court will note that the government's proof by way of the FBI inventories fairly well described each listed item on the inventory. The problem was not with the proof, the inventories, but the problem is with the indictment. For example, this writer counted thirteen separate items which could be deemed living room furniture, on the Tampa inventory, including adequately described desks, divans, end tables, living room chairs, reclining chairs, swag lamps, clocks, cocktail tables, settees and ottomans, to say nothing of some three specifically referred to couches, six sofas, four love seats, and twenty-seven chairs, any or all of which could be "living room furniture". Again, the jeopardy problem—what if the government indicts next week and indicts for specific items of living room furniture? How can jeopardy be raised—we suggest it can't.

Regarding bedroom furniture, the government's evidence showed fifty-eight specific pieces of what can be deemed bedroom furniture, including night tables, bed frames, mattresses, chests, dressers, headboards, beds, box springs and dresser mirrors. Electrical appliances—count a minimum of twenty-three including refrigerators, refrigerator freezers, washers, dryers, coffee makers, auto stoves, freezers, dishwashers, vacuum cleaners, electric stoves, electric hair dryers, mixers, microwave ovens, all of which are identified such that they *could have been* specifically referred to in the indictment, as *could have been* the bedroom furniture or the living room furniture. The problem

—the specific governs the general and how are the Defendants to counter by way of jeopardy if subsequently indicted for the specific? Note the myriad of "other household merchandise" which is specifically described in the Tampa inventory.

It might be well to point out at this time that the government's proof totally failed to show of the Tampa inventory which truckload it came from. The only way that might have been proved was from an individual inventory of each truckload, each truckload pertaining to each count of the indictment—but the government's proof failed woefully to show such proof. To sustain a conviction of counts II through V the government must prove which of the inventory items came off the respective truckloads. Again, even assuming the indictment sufficient, which it is not, the government failed to prove which chairs, etc. came from the individual loads per the indictment.

Count III—referred to "one Bassett bedroom suite, five sofas, five chairs, one Admiral color television set and other household merchandise". Again, the Court is implored to look at the government's proof. Study the Tampa inventory, and when you do you will find *no* Bassett bedroom suite listed as such, but you will find at least six sofas, twenty-seven chairs and seven Admiral color TVs as well as a plethora of other "household Merchandise". How can we tell which of the sofas pertain to Count III, which of the chairs, which of the Admiral color TVs and which of the "other household mercandise"? We can't—thus we have a variance in proof and indictment as well as the jeopardy problem concerning subsequent indictments.

Count IV—refers to "household merchandise", which is clearly insufficient as allegation for reasons previously stated; which household merchandise? The government's proof failed to show any particular household merchandise which it can link to Count IV.

Count V—referred to "two couches, one love seat, four chairs, a console stereo, and other household merchandise". If the Court will only look at the government's proof it will note at least three specifically described couches, four love seats, at least twenty-seven chairs and *no* mention of any console stereo—and a plethora of other household merchandise (but how can we tell which of the "other" applies to Count V). How can we tell which of the three couches is contemplated by Count V, how can we tell of the love seat which is contemplated by Count V, which of the at least twenty-seven chairs is contemplated by Count V? We can't, no matter how one might rationalize or equivocate to sustain the conviction, there is simply no way we can tell of what the Defendants were convicted. This is substantive, this is serious.

At this point, all previous citations given to the Court are reiterated, and this writer feels that those authorities clearly state why the Court should dismiss Counts I through and including V, and/or grant Judgment of Acquittal pertaining to same.

This leaves Count VI, the conspiracy count. It must be realized that on its face Count VI of the indictment fails to allege a conspiracy in violation of a Statute of the U.S., thus fails to state the object of the conspiracy. The government's contention that Count VI identifies Title 18, Section 152 is specious, in light of the Statute,

Section 152, itself, which creates eight separate offenses. Which one is meant in Count VI? Obviously, the government attempted to refer to the sixth paragraph of Section 152, but failed because it omitted the words of art "knowingly and fraudulently" in two crucial parts of the Count. At this juncture defense counsel grows weary of being placed in the position of having to aid the government in the pleading and prosecution of its case, but by way of illustration Count VI might have properly read:

"The Grand Jury further charges that from on or about July 20, 1973, and through and including July 27, 1973, in the Eastern District of Tennessee, Roger Dunlap, and Paul Cunningham, also known as Paul Dunlap, the Defendants, did willfully and knowingly combine, conspire, conferate and agree together with each other to *knowingly and fraudulently* commit the following offense against the United States:

1. *Knowingly and fraudulently,* as officers of Tippens etc." The Court's attention is again commended to *Conrad v. U. S.,* 127 Fed. 798 and *U. S. v. Comstock,* 162 Fed. 415, which point out that the elements of the crime conspired to be violated must be set forth in the conspiracy count. See also *Bartkus v.* U. S., 21 F.2d 425, *U. S. v. Watson,* 17 Fed. 145 and *U. S. v. Eisenminger,* 16 F.2d 816.

Regarding jeopardy re Count VI—where did the jury find the conspiracy to have occurred, in Chattanooga or elsewhere or both? If indicted for conspiracy in Tampa—how is jeopardy to be raised—for the jury may have found conspiracy only in Chattanooga, or Tampa, or Pensacola, or along the way from Chattanooga to Pensacola and/or Tampa, or the world. How can you tell from the indictment of what conspiracy the Defendants have been convicted?

And finally, at this point, regarding Count VI—was it an overall conspiracy, or was it several conspiracies? Was it a conspiracy to act per Count I, Count II, Count III, Count IV, Count V, or all of them? Is it a conspiracy pertaining to a substantive offense which never occurred, or does it relate to the other counts? How can we tell? If the jury thought it referred to the other counts, the jury's verdict was improper as a conspiracy must precede the substantive offense, citations previously given. A conspiracy cannot co-exist with the substantive offense which it contemplates.

One other quite pertinent reason why the Court should grant Defendants' Motion for Acquittal is that the government's proof was devoid of any evidence that the Defendants had any notice, of any type, actual or constructive, pursuant to a Federal Bankruptcy proceeding. The evidence showed, if anything, notice of a State Court proceeding. One of the elements of the government's case is "knowingly", thus the offense cannot be committed without some knowledge on the part of the Defendant of the existence of the bankruptcy proceeding—(paraphrased from *Rachmil v. U. S.*, 43 F.2d 878). Additionally, there had to be a conclusion by the Court, as a matter of law, that the actual notice the evidence showed with reference to the State Court action, raised a *reasonable doubt* in the minds of the jurors—if not, in the Court, and if so the Court must grant Judgment of Acquittal.

In summary and conclusion, again, we move the Court grant Judgment of Acquittal as to all counts, or as to those counts the Court may deem proper. Obviously, the grand jury had a more adequate description of the property than as described in the first five counts—the attachment to the Sixth Count, as well as the government's

proof proves that to a certainty, thus there is, as a matter of law, a fatal variance between the allegations and proof. "When this is the case, it is the *duty* of the trial court to direct a verdict for the Defendant when so requested. *U. S. v. Rhodes,* 212 F. 513, *Duff v. U. S.,* 185 F. 101, 107 C.C.A. 319, *Hedderly v. U. S.,* 193 F 561, *Wilborg v. U. S.,* 163 U.S. 632, 16 S.Ct. 1127, *Crumpton v. U. S.,* 361, 11 S.Ct. 355.

In recap, then, we can see why the legal requisites of proper indictment pleading exist. *How* were the concealments effectuated, what was their method—of what manner of concealment did the jury convict? Not knowing, and legally not being able to presume, how can the Defendants take a plea of jeopardy to subsequent concealments? How were the transfers effectuated, what were their methods—where are and whom are the transferees? Again, we don't know, and again we can't raise jeopardy. The foregoing in this paragraph, of course, refers specifically and directly to counts I through and including V.

With regard to the property allegedly concealed and/or transferred, regarding Count I—how could the jury convict re Basic-Witz, the evidence failed to show it? Which Admiral Refrigerator, or both? We can't possibly know as they were not described in the indictment with the particularity they were in the proof. Which two sofas—the evidence didn't show any sofas in Pensacola—even if the evidence had shown Basic-Witz bedroom furniture and the sofas we suspect the evidence would have shown it in such a manner that there would simply be no way to tell which sofas, which Basic-Witz the jury convicted on, because of improper description of same in the indictment.

Regarding Count II, which property induced the jury to convict? With regard to living room furniture, of the thirteen items on the Tampa inventory which might be deemed living room furniture, did they convict on one piece, on all pieces? How did they know those items came off the Bobby Wayne Stover load? There is simply no evidence to show it. As the indictment did not specifically describe the living room furniture, how could the jury possibly know? How can jeopardy be raised regarding the specific pieces? The same rationale applies to the bedroom furniture and the electrical appliances. This is why the government may not generally plead property description—when it does the evidence can be warped to mean anything—in this day and time the Courts at least give lip service to the proposition that an individual can't be convicted with reference to the type of pleading here under attack. If the law of indictments means anything, then our indictment is insufficient.

In Count Three, what Bassett bedroom suite—the evidence didn't show a Bassett bedroom suite. What five sofas—was it (1) one sofa with nine cushions yellow/gold, was it (2) one naughahyde sofa—red, was it (3) one classic sofa, gold and white, or (4) one Stratford sofa, gold striped, or (5) custom built (Marshall's Inc.) green and white sofa (full size), or (6) one brown and white classic sofa, full size—or one of them, or all of them? Which five of the six came off the Mitchell truck? What is to stop the government from again indicting for specifically described sofas? Of the "five chairs", which of the some twenty-seven chairs came off Firman Mitchell's truck? Of the at least seven Admiral color TVs supposedly found by the FBI in Tampa, which one of the seven came off Mitchell's truck? There is simply no way to tell. We

simply don't know what items came from what truck. We don't know of what the Defendants have been found guilty. Count Four—what household merchandise came from Charles Lee Myers' truck? How could the jury determine it—the pleadings didn't say.

Count Five—which two couches of the at least three listed came off Paul Worley's Truck? None of the drivers identified which—and the jury couldn't know per the inventory because the inventory certainly didn't so indicate. Which of the at least four love seats listed was the one referred to in the pleadings? Which four chairs of the at least twenty-seven chairs listed pertain to Count IV, and where at all is a "console stereo" in evidence. Where is an offense stated in Count Six—it is not a crime "to with unlawful and fraudulent intent, etc."—the crime is "*knowingly* and fraudulently". This is crucial—one must know he is conspiring to violate a law. Any number of instances could be found where unlawful and fraudulent acts were committed—but unless it is demonstrated they were *knowing* acts, as properly charged by this Court—then no offense.

All in all, although the government might well have properly plead and proved its case—the fact remains that it didn't for reasons set forth hereinbefore and pursuant to previous motions, rationale and arguments advanced by the Defense. Why force the Defendants to an appeal? The difficulties in this case have been caused by the government, and it has its recourse if the indictment is dismissed. Why should the Defendants and their families suffer the mental anguish and further humiliation while their case is on appeal? Regardless of the Court's prior opinions concerning our attacks on the indictment, at this time the Court must entertain some doubts as to the

sufficiency of the indictment, and if so is morally and legally bound to dismiss. If the Court does not so act, then the perfectly valid citations which have been provided the Court regarding the law of indictment can only seem to mean nothing to this Court. We cannot believe that this is the case, we do believe that this Court is fair and honors the objects of justice. Why should the Court condone the government's poor practice at this juncture? If there is the slightest doubt in the mind of the Court pursuant to the sufficiency of the government's pleadings and/or proof, then it is honor bound to rule for Defendants and let the government take what remedy it may.

There have been a myriad of oversights indulged in by the government with respect to this case, just a few of which have been mentioned in this Memorandum. It should not fall upon the Court's shoulders to again sanction or correct the government's pleadings or proof—and if the Court will only seriously consider this instrument it must strike the indictment and/or grant Motion for Judgment of Acquittal, both of which are hereby respectfully prayed; an opinion is requested pursuant to this Motion, such opinion to properly state the Court's finding of facts and conclusions of law pertaining thereto.

Respectfully submitted,

/s/ Jack R. Bailey
JACK R. BAILEY
Attorney for Defendants
711 Fannin, Suite 316
Houston, Texas 77002
(713) 224-5592

(Certificate of Service)

APPENDIX F

MEMORANDUM and ORDER

(Filed January 23, 1974)

This case is presently before the Court on a combined motion by the defendants for judgment of acquittal and dismissal of the indictment. The case involved a prosecution for the transfer or concealment of goods in contemplation of bankruptcy, 18 U.S.C. § 152, and conspiracy, 18 U.S.C. § 371. The indictment contained five separate counts charging the substantive offense of transfer or concealment to defeat bankruptcy, and the sixth count charged a conspiracy to transfer or conceal assets with intent to defeat bankruptcy.

The gist of the evidence upon the trial was to reflect that the defendants conducted the affairs of the Tippens Furniture & Appliance Company, a Chattanooga, Tennessee, retail furniture outlet, which they purchased upon April 27, 1973, in such a manner that within three months the financial condition of the corporation changed from a net worth in excess of $100,000 to a net indebtedness in excess of $500,000. The indictment charges the defendants with transferring and concealing property of the company by shipping large quantities of company owned furniture to Florida to the individual order of the defendants a few days before bankruptcy proceedings were initiated.

The defendants attack the indictment for the following reasons:

(1) The counts fail to allege the method of concealment and/or transfer;

(2) The property of the bankrupt therein described was either not described with specificity and/or the evidence adduced at trial regarding such property was insufficient, or so broad as to preclude the defendants' raising jeopardy at subsequent trials;

(3) The proof offered at trial was at variance with the allegations of the indictment;

(4) The evidence offered at trial was devoid of proof concerning any "transfer" as per jury instruction;

(5) On its face, the indictment improperly attempted to define "transfer";

(6) Count Six of the indictment fails to state an offense; and

(7) The indictment fails to comport with Criminal Rule 7(c). The defendants also contend that the evidence was insufficient to sustain the verdict. The Court will discuss the defendants' contentions in the above order.

The defendant contends that the counts fail to allege the method of concealment and/or transfer, but the Court finds otherwise. The counts specify that the property was transferred or concealed by shipping it from Chattanooga, Tennessee, to Tampa, Florida. The indictment further provides the date of each shipment and the driver of each truck. It may be noted in this regard that the subject statute makes it unlawful to "transfer or conceal" and is to be applied in the disjunctive. *Burchinal v. United States,* 342 F.2d 982 (10th Cir. 1965), *cert. denied,* 382 U.S. 843 (1965).

The defendants next contend that the description of the property in the indictment is inadequate and pre-

cludes the defendants from pleading former jeopardy in future trials. This contention is without merit, however, as each count identifies specific items or categories of furniture with the exception of Count Four, which identifies the property transferred or concealed as "household merchandise of a value in the amount of $500.00 or more". It is true, of course, that one of the most important purposes of an indictment is to insure that the defendant can enter a plea of former jeopardy. ***Russell v. United States***, 369 U.S. 749, 8 L.Ed.2d 240, 82 S.Ct. 1038 (1962). This requirement is, however, of primary importance only before the trial due to the practice of allowing a defendant to resort to the entire record of previous proceedings and even parol evidence in establishing a defense of former jeopardy. ***See Russell v. United States, supra; Bartell v. United States***, 227 U.S. 427, 433, 57 L.Ed. 583, 585, 33 S.Ct. 383 (1912). This practice would clearly remove all validity from the defendant's contention that they will be unable to enter a plea of former jeopardy in any future proceedings.

The defendants' contention that the proof at trial was at variance with the allegations of the indictment is also inappropriate. The crimes of which the defendants are convicted involve five different shipments of goods to certain places of storage in Florida. Although in drawing the indictment the grand jury had available a detailed inventory prepared by the F.B.I. of the contents of the Florida warehouses, it had only the truck drivers' testimony in alleging the specific contents of each shipment. The defendants contend that the inventory should have been used to allege with more particularity the contents of each shipment, but this would have been impossible since there is no way to identify the property in the ware-

house according to individual shipments. At the trial, the Government introduced evidence of one or more items of furniture corresponding with the allegations in each count of the indictment. The contention of a variance in this regard is believed to be without merit.

Although the property descriptions in some of the counts were somewhat general, the Court is of the opinion that they were sufficient in the present case. As stated in *Kanner v. United States*, 21 F.2d 285, 287 (2d Cir. 1927):

> The crime is one which is peculiarly within the bankrupt's own knowledge, and one which may be committed under circumstances which render impossible a description of the assets concealed. Where the very essence of the crime is secreting property, how can it be necessary to allege knowledge of that of which the defendant's own acts prevent any knowledge? *See also Beitel v. United States*, 306 F.2d 665, 668 (5th Cir. 1962).

This language has been qualified in a case where the grand jury could have described the property with more particularity but did not. *Beitel v. United States*, 306 F. 2d 665 (5th Cir. 1962). The present case, however, presents no such problem.

It is next contended that the indictment is inadequate to allege an unlawful transfer and the evidence is inadequate to support a verdict finding a transfer. These contentions are without merit. The indictment charged an unlawful transfer and there was evidence from which the jury could have found an unlawful transfer to have been committed by the defendants. It is apparently the theory of the defendants that only a physical movement

of the property was alleged in the indictment and established by the evidence and that such does not constitute a "transfer". The jury, however, was instructed that "mere transportation of property is not a 'transfer' but rather that 'the word transfer means the disposition of the ownership or possession of property of the bankrupt . . ." Each count of the indictment alleges and the jury could find from the evidence that the defendants did attempt to "transfer" furniture from the corporate ownership and possession to their individual ownership and possession upon each occasion they caused furniture to be removed from the store's inventory in Chattanooga and delivered to a place of storage in Florida.

With reference to the conspiracy count (Count Six) the defendants contend that the indictment is defective in that it fails to allege that the defendants conspired to "knowingly and fraudulently" transfer or conceal assets to defeat the bankruptcy law. The contention is without merit. The indictment specifically charges that the defendants "willfully and knowingly" conspired "with unlawful and fraudulent intent" to transfer and conceal property to defeat the bankruptcy law.

The defendants next assert that the indictment fails to comport with Criminal Rule 7(c). The contention is without merit. Each count contains a "plain concise and definite written statement of the essential facts constituting the offense charged." *Crim. R. Pro.* 7(c). In the present case, there is a sufficient description in each count of the property concealed. *Cf. White v. United States,* 67 F.2d 71 (10th Cir. 1933) ("personal property of said Pig Skin Davis."); *United States v. Mathies,* 203 F. Supp. 797 (W.D. Pa. 1962) ("merchandise commonly sold in a self-service department store). *See also Kanner v. United*

States, 21 F.2d 285 (2d Cir. 1927), *cert. denied*, 275 U.S. 564, 48 S.Ct. 122, 72 L.Ed. 428. The method of concealment is described as transportation out of the state. More specifically, each count alleges the date of each shipment, the driver of each truck, and the destination of each shipment. *Cf. case cited by defendants United States v. Mathies*, 203 F.Supp. 797 (W.D. Pa. 1962).

Finally, it is also contended that there was no evidence that the defendants had any notice of the "existence of the bankruptcy proceeding" when they shipped the property to Florida. This contention stems from a misapprehension with regard to the law. The crime for which the defendants were convicted involves acts done "in contemplation of a bankruptcy proceeding." Since the crime occurs, by definition, before bankruptcy proceedings have been filed, knowledge of the existence of a bankruptcy proceeding is not required. Rather, the acts must be done "in contemplation of a bankruptcy proceeding." There is sufficient evidence to show that the defendants here acted in contemplation of bankruptcy proceedings.

Having considered each matter asserted in the defendants' motion, the Court is of the opinion that the motion is without merit and should be overruled with regard to each matter asserted therein.

It is SO ORDERED.

ENTER:

/s/ FRANK W. WILSON
United States District Judge

APPENDIX G

NOTICE OF APPEAL

(Filed January 25, 1974)

TO THE HONORABLE COURT:

Come now Roger Dunlap and Paul Cunningham a/k/a Paul Dunlap, and each of them, and file this, their Notice of Appeal, and would show:

1. Judgment has been assessed by the Court on January 25, 1974 as follows:

(a) Roger Dunlap is remanded to the custody of the Attorney General for a period of 6 months, on Counts I and VI, and on Counts II, III, IV and V for a period of 2 years each, to run concurrently, but to run consecutively with the 6 months on Counts I & VI. The sentence of 2 years on Counts II, III, IV and V is suspended, and defendant to be under probation for a period of 2 years pursuant to same;

(b) Paul Cunningham is remanded to the custody of the Attorney General for a period of 2 years each on each of Counts I thru and including VI, the times to run concurrently;

To which judgment, the defendants, and each of them hereby accept, and give this their notice of appeal to the 6th Circuit Court of Appeals;

Respectfully submitted

/s/ JACK R. BAILEY
Jack R. Bailey
Attorneys for Defendants
5100 Westheimer
Houston, Texas
627-0252

APPENDIX H

UNITED STATES OF AMERICA

v.

ROGER DUNLAP

No. 13,131

JUDGMENT AND COMMITMENT

On this 25th day of January, 1974 came the attorney for the government and the defendant appeared in person and by retained counsel, Jack R. Bailey, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Counts 1, 2, 3, 4, 5, on 7/24/73, in the Eastern District of Tennessee, together with Paul Cunningham, aka Paul Dunlap, as officers of Tippens Furniture and Appliance, Inc., bankrupt, Court No. 39870, in contemplation of the filing of bankruptcy proceedings against the bankrupt, knowingly and fraudulently and with intent to defeat the bankruptcy law, transferring or concealing property of the bankrupt: and Ct. 6, that from 7/20/73 through 7/27/73, in the Eastern District of Tennessee and elsewhere, together with Paul Cunningham, aka Paul Dunlap, wilfully and knowingly combined, conspired, confederated, and agreed together with each other, with unlawful and fraudulent intent as officers of Tippens Furniture and Appliance, Inc., bankrupt, Court No. 39870, and in contemplation of the filing of bankruptcy proceedings against the bankrupt and with intent to defeat the bankruptcy laws, transferring or concealing property of the bankrupt, in violation of the laws of the

United States, Title 18, U.S.C., Section 152, as charged in the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) MONTHS on each of counts 1 and 6, concurrent as to counts; and TWO (2) YEARS on each of counts 2, 3, 4, and 5, concurrent as to counts, but consecutive to the sentence imposed on counts 1 and 6.

IT IS ADJUDGED that execution of the TWO (2) YEARS sentence imposed on counts 2, 3, 4, and 5 be suspended, and the defendant is placed on probation for a period of TWO (2) YEARS on each of counts 2, 3, 4, and 5, concurrent as to counts, but consecutive to sentence imposed on counts 1 and 6.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Frank W. Wilson
United States District Judge

The Court recommends commitment to:

KARL D. SAULPAW, JR.
Clerk

APPENDIX I

No. 13,131

UNITED STATES OF AMERICA

v.

PAUL CUNNINGHAM, a/k/a
PAUL DUNLAP

JUDGMENT AND COMMITMENT

(Filed January 25, 1974)

On this 25th day of January, 1974 came the attorney for the government and the defendant appeared in person and by retained counsel, Jack R. Bailey, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Counts 1, 2, 3, 4, 5, on 7/24/73, in the Eastern District of Tennessee, together with Roger Dunlap, as officers of Tippens Furniture and Appliance, Inc., bankrupt, Court No. 39870, in contemplation of the filing of bankruptcy proceedings against the bankrupt, knowingly and fraudulently and with intent to defeat the bankruptcy law, transferring or concealing property of the bankrupt; and Ct. 6, that from 7/20/73 through 7/27/73, in the Eastern District of Tennessee and elsewhere, together with Roger Dunlap, wilfully and knowingly combined, conspired, confederated, and agreed together with each other, with unlawful and fraudulent intent as officers of Tippens Furniture and Appliance, Inc., bankrupt, Court No. 39870, and in contemplation of the filing of bankruptcy proceedings against the bankrupt and with intent to defeat the bankruptcy laws, transferring or concealing prop-

erty of the bankrupt, in violation of the laws of the United States, Title 18, U.S.C., Section 152, as charged in the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS on each of Counts 1, 2, 3, 4, 5, and 6, concurrent as to counts.

IT IS ADJUDGED that

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Frank W. Wilson
United States District Judge

The Court recommends commitment to:

KARL D. SAULPAW, JR.
Clerk

APPENDIX J

NOTICE OF APPEAL

(Filed February 1, 1974)

Come now the Defendants, ROGER DUNLAP and PAUL CUNNINGHAM, a/k/a PAUL DUNLAP, by and through their attorney, JACK R. BAILEY, and file this, their notice of appeal, this notice of appeal replacing and supplanting that notice of appeal which was previously filed on January 25, 1974, but which prior notice of appeal is incorporated herein by reference and made a part hereof, and this instant notice of appeal being filed such that it more fairly comport with the requisites of content prescribed by the Federal Rules:

1. The name and address of the appellants are as follows:

Paul Cunningham
8323 West Hiawatha
Tampa, Florida

Roger Dunlap
2155 Jeffcott Street
Fort Myers, Florida

2. The name and address of appellants' attorney is as follows:

Dickerson, Bailey & Vela
Jack R. Bailey—Lead Counsel
for Appellants
5100 Westheimer, Suite 100
Houston, Texas 77027

3. The offenses in this case concerned a six count indictment, the first five counts being substantive offenses

pursuant to Title 18, Section 152 of the United States Code, to-wit, the offenses of concealing or transferring assets in contemplation of bankruptcy, and the sixth count being a conspiracy count, pursuant to Title 18, Section 371 of the United States Code. Each of the six counts applied to each of the appellants, and each of the appellants was found guilty per jury trial on each of the six counts.

4. Judgment in the cause was entered on January 25, 1974, which Judgment attached to appellants as follows:

(a) With respect to Roger Dunlap, it was the judgment of the Court that Roger Dunlap be sentenced to six (6) months pursuant to counts one and six of the indictment, the six (6) months to run concurrently with regard to those counts. In addition, it was the judgment of the Court that Roger Dunlap be sentenced to two (2) years on each of counts two, three, four and five, those times also running concurrently, but, to run consecutively with the six (6) months regarding counts one and six. Imposition of sentence regarding the two (2) years on counts two, three, four and five was suspended, and Roger Dunlap placed on two (2) years probation after satisfying the six (6) month sentencing pursuant to counts one and six.

(b) It was the judgment of the Court that Paul Cunningham, a/k/a Paul Dunlap, be sentenced to two (2) years on each of counts one, two, three, four, five and six, the said two (2) years on each of said counts to run concurrently.

5. The previous bonds of $25,000.00 each were continued by the Court while appellants' appeal is prosecuted and until final disposition is made of same. Appellants

were released pursuant to those bonds, and pending their appeal.

WHEREFORE, the above-named appellants hereby appeal to the United States Court of Appeals for the Sixth Circuit from the above-stated Judgment.

DATED January 29, 1974.

Respectfully submitted,

/s/ Jack R. Bailey

JACK R. BAILEY
Dickerson, Bailey & Vela
5100 Westheimer, Suite 100
Houston, Texas 77027 627-0252
Attorney for Appellants

APPENDIX K

ORDER EXTENDING TIME TO FILE TRANSCRIPT

(Filed February 26, 1974)

Upon application of the Official Court Reporter, and for good cause shown, it is

ORDERED that the time within which the transcript of proceedings may be filed is hereby extended to and including March 27, 1974, and that the Clerk of this Court have five (5) days thereafter in which to file the record on appeal in this cause.

ENTER:

/s/ Frank W. Wilson
United States District Judge

APPENDIX L

No. 74-1391

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROGER DUNLAP, PAUL CUNNINGHAM,
a/k/a PAUL DUNLAP,
Defendants-Appellants

ORDER AFFIRMING CONVICTION

(Filed November 5, 1974)

BEFORE: EDWARDS AND McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

The appeal from conviction of violations of Title 18, § 152 and 371 of the United States Code having come on to be heard upon briefs and oral argument, and it appearing that no error was committed in overruling the motion for acquittal because there was ample evidence of guilt to require submission to the jury, and it further appearing that there is no defect in the indictment or any variance between the proofs and the indictment, and it further appearing that no error has intervened to taint the convictions, upon consideration, it is ORDERED that the judgment be, and it hereby is, AFFIRMED.

Entered by order of the Court.

JOHN P. HELMAN
Clerk